

In the Matter of Glenn Crane, City of Newark

DOP Docket No. 2004-4104

(Merit System Board, decided August 11, 2004)

Glenn Crane, a former Supervising Public Safety Telecommunicator with the City of Newark, represented by Colin M. Lynch, Esq., requests Merit System Board review of his return to his permanent title of Fire Alarm Operator, effective May 28, 2004.

Department of Personnel (DOP) records reflect the following: The appellant was permanently appointed to the title of Fire Alarm Operator on September 13, 1982. He took and passed a promotional examination for the title of Chief Fire Alarm Operator (PM3580M), City of Newark, and he was ranked third on the resulting eligible list, which promulgated on March 14, 1991 and expired on March 13, 1995. A certification of that eligible list was issued on August 11, 1992, on which the appellant appeared in the second position. The appointing authority disposed of that certification, appointing the individual who appeared in the first position, Susan Caufield-Pinal. On August 15, 1994, the appellant received notification from Stanley J. Kossup, former Director/Fire Chief, that he was being appointed to the title of Chief Fire Alarm Operator, effective August 22, 1994. Kossup indicated that the appellant's promotion was being undertaken "in accordance with New Jersey State Department Eligible Promotional List PM3580M." However, according to DOP records, the appellant's appointment to Chief Fire Alarm Operator on August 22, 1994 was reported to the DOP as provisional, pending a certification of the Chief Fire Alarm Operator (PM3580M) eligible list. On February 3, 1995 a certification of the subject eligible list was issued to the appointing authority, containing the names of three eligibles. At the time this certification was issued, the individual in the second position had retired from service, and his name was removed from the eligible list. Thus, because the certification was incomplete, the appointing authority declined to make a permanent appointment at this time. *See N.J.A.C. 4A:4-4.2(c)2i*. Following the expiration of this eligible list, a subsequent promotional examination for Chief Fire Alarm Operator (PM3126V), City of Newark, was announced, and the resulting eligible list promulgated on September 25, 1997 and expired on September 24, 2000. The appellant's name did not appear on this eligible list.

On June 21, 1999, the DOP was notified that the appellant had been performing the duties of the Assistant Chief of Fire Signal Operations since July 1, 1998, the date of the retirement of the incumbent in that title. Upon receipt of this information, the DOP initiated an audit of the appellant's position to determine the proper classification of his position. On February 3,

2000, the DOP notified the appointing authority and the appellant that, as a result of the audit, it was determined that the appellant was performing the duties of a Supervising Public Safety Telecommunicator. Thus, the parties were notified that the appellant was considered to be provisionally appointed to the title, pending promotional examination procedures, effective September 9, 1999. DOP records reflect that there have been three eligible lists for the title of Supervising Public Safety Telecommunicator since the date of the appellant's provisional appointment. The appellant's name has not appeared on any of these eligible lists. Thus, upon the promulgation of the most recent eligible list for Supervising Public Safety Telecommunicator (PM1925E), City of Newark, on April 29, 2004, the appointing authority advised the appellant that he was being returned to his prior permanent title of Fire Alarm Operator, effective May 28, 2004.

In the instant request, the appellant argues that he was permanently appointed to the title of Chief Fire Alarm Operator, and he cannot be demoted from that title, particularly where, as here, he is not the subject of any disciplinary or layoff action. The appellant maintains that he was appointed from the Chief Fire Alarm Operator (PM3580M), City of Newark, eligible list, effective August 22, 1994. In support of this assertion, the appellant submits a copy of the August 15, 1994 letter from Kossup, advising him of his appointment "in accordance with New Jersey State Department Eligible Promotional List PM3580M." He also submits a copy of the program from his swearing-in ceremony on August 22, 1994. In addition, the appellant submits sworn statements from Kossup and John Sandella, a Fire Captain with the City of Newark. In his statement, Kossup indicates that "[a]s a result of a Certification issued by the Department of Personnel and with the approval of the City, I notified [the appellant], who held the rank of Fire Alarm Operator, that he would be promoted to the rank of Chief Fire Alarm Operator." Kossup also notes that he was never advised that the appellant's appointment to that title was anything other than permanent. Sandella, who is also the President of Newark Fire Officers Union, Local 1860, AFL-CIO, indicates that the appointing authority could not have provisionally appointed the appellant to the title of Chief Fire Alarm Operator in 1994, since there was an eligible list in effect for that title at the time. Sandella also notes that he was never advised that the appellant's appointment was provisional. Moreover, the appellant notes that the appointing authority never notified him of the necessity of taking any subsequent promotional examinations for the title of Chief Fire Alarm Operator in order to retain his position.

In response, the appointing authority, represented by David N. Gampert, Assistant Corporation Counsel, argues that the appellant was aware that he had not been permanently appointed to the title of Chief Fire

Alarm Operator in August 1994, when he received a Notification of Certification from the DOP on February 3, 1995. The appointing authority contends that this put the appellant on notice that his appointment would not become permanent until it was effectuated from this certification. The appointing authority also submits a copy of the appellant's February 6, 1995 response to this Notification of Certification, as well as a copy of a Request for Personnel Action, indicating that the appellant's August 22, 1994 appointment was provisional, pending certification of the promotional list.¹ Additionally, in a letter dated February 14, 1995, John K. D'Auria, Personnel Director, notified Kossup of the issuance of the certification on February 3, 1995 and requesting Kossup's response regarding what action would be taken. While there is no indication in the record as to Kossup's response to this letter, the certification was returned to the DOP, indicating that no permanent appointments would be made from the incomplete certification. The appointing authority also notified the DOP that the appellant would be "retained as provisional." Thus, since the appellant remained at all times provisional in the title of Chief Fire Alarm Operator, the appointing authority argues that he could be returned to his permanent title at any time. Moreover, the appointing authority contends that this action was necessary upon the promulgation of the eligible list for Supervising Public Safety Telecommunicator (PM1925E), City of Newark.

In response, the appellant contends that there can be no question that the appointing authority failed to properly notify him of his provisional status and of the necessity of taking any subsequent examinations for Chief Fire Alarm Operator in order to achieve permanent status. The appellant also asserts that the appointing authority is estopped from claiming that his appointment was provisional, particularly after he served in the title for close to 10 years.

CONCLUSION

In *Kyer v. City of East Orange*, 315 N.J. Super. 524 (App. Div. 1998), the court determined that the City of East Orange's ("City") actions in denying Kyer, a seven-year employee, the opportunity to ever achieve permanent status in her competitive career service position, contrary to the Civil Service Act, were so egregious that they warranted a unique remedy.

It is our view that a delicate balance must be struck between the public and private interests that are subject to prejudice when a governmental entity fails to comply with its statutory obligations. Estoppel is not the answer. First, the Supreme

¹ It is noted that this form is signed by Kossup, but the space allotted for the employee's signature is blank.

Court has precluded that solution. Second, unqualified persons may thereby be afforded an improper route to permanency. But by the same token, it is no solution to leave remediless the well-qualified, experienced, high-performing, long-term provisional employee *who is unaware that her position is not permanent, who in all likelihood would have easily achieved permanency but for the municipal negligence*, and whose summary discharge from employment is as obviously unfair and arbitrary as this jury found plaintiff's to be. [*Kyer, supra*, 315 *N.J. Super.* at 532-533 (emphasis added)].

Accordingly, the court transferred the case to the DOP to retroactively determine whether Kyer would have qualified for the competitive career service position she provisionally held for seven years and, if so, "to fashion an appropriate remedy." *Id.* at 534. Ultimately, after the remand, the Board determined that, notwithstanding Kyer's years of service or the misdeeds of the appointing authority, she was not entitled to a permanent appointment since she did not meet the open-competitive requirements for the position at the time the provisional appointment was initially made. *See In the Matter of Ruby Robinson Kyer* (MSB, decided May 4, 1999). *See also Melani v. County of Passaic*, 345 *N.J. Super.* 579 (App. Div. 2001).

In the instant matter, while there is no evidence which establishes that the appointing authority acted in such a grossly negligent manner as the City of East Orange did with respect to Kyer, there is evidence in the record that the appellant was given misleading information regarding the status of his employment. Specifically, when the appellant was appointed to the title of Chief Fire Alarm Operator on August 22, 1994, Kossup informed him that his appointment was made "in accordance with New Jersey State Department Eligible Promotional List PM3580M," thereby conveying the impression that the appellant was being permanently appointed from this list. While Kossup later signed the Request for Personnel Action form, reflecting that the appellant's August 22, 1994 appointment was provisional, there is no evidence that the appellant was ever presented with this form or in any other way notified that his appointment was provisional. Moreover, Kossup also indicates in a sworn statement that he effectuated the appellant's permanent appointment from a certification of the Chief Fire Alarm Operator (PM3580M) eligible list. The appellant also attended a formal ceremony on August 22, 1994, at which he was officially sworn into the position of Chief Fire Alarm Operator. It is noted that Kossup and Mayor Sharpe James also presided at this ceremony. Largely due to Kossup's assurances regarding the permanency of his appointment and the appointing authority's failure to notify him of the necessity of taking any further action in order to perfect his permanent appointment, the appellant failed to take

any further promotional examinations for the title of Chief Fire Alarm Operator. Thus, the misinformation regarding the status of his employment precluded the appellant from taking the steps necessary to achieve permanency in that position. Moreover, unlike in *Kyer*, the appellant's eligibility for appointment to the title of Chief Fire Alarm Operator was confirmed by the DOP prior to his provisional appointment. In this regard, the appellant filed and was deemed eligible for the title of Chief Fire Alarm Operator, and he appeared on the resulting eligible list. Therefore, under these circumstances, the record supports recognizing the appellant's permanent appointment to the title of Chief Fire Alarm Operator. However, the Board finds that the appellant's permanent appointment should be recorded as February 3, 1995, the date of the certification from which he could have been appointed. In this regard, it must be recognized that, while the appointing authority led the appellant to believe his appointment was permanent on August 22, 1994, the subject eligible list was not certified and the appellant's permanent appointment could not have been effectuated until February 3, 1995. Thus, this is the earliest date on which a permanent appointment could have properly been effectuated.

Finally, the Board notes that the appellant's displacement from the title of Supervising Public Safety Telecommunicator is proper. In this regard, the appellant received notification from the DOP on February 3, 2000 that his position was reclassified to the title of Supervising Public Safety Telecommunicator, and he was considered provisionally appointed to that title, effective September 9, 1999. Thus, there can be no question that the appellant was aware of the provisional status of his appointment to this title. Notwithstanding this notification, the appellant failed to file for any subsequent promotional examinations for this title. Thus, the appointing authority properly separated the appellant from his provisional title of Supervising Public Safety Telecommunicator, effective May 28, 2004, following the promulgation of a complete eligible list for that title. However, as discussed in more detail above, the appellant's displacement from the title of Supervising Public Safety Telecommunicator should have resulted in the return to his permanent title of Chief Fire Alarm Operator, rather than the lower title of Fire Alarm Operator. Accordingly, the appellant's personnel records should be changed to reflect his permanent appointment to the title of Chief Fire Alarm Operator on February 3, 1995, his provisional appointment to the title of Supervising Public Safety Telecommunicator on September 9, 1999, and his return to his permanent title of Chief Fire Alarm Operator on May 28, 2004. Moreover, the appellant should be awarded differential back pay for the period of May 28, 2004 until the date of his reinstatement to the Chief Fire Alarm Operator title.

ORDER

Therefore, it is ordered that the appellant's request for permanent status as a Chief Fire Alarm Operator, effective February 3, 1995, be granted and he be awarded differential back pay from May 28, 2004 until the date of his reinstatement to the Chief Fire Alarm Operator title.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.